Supreme Court, U.S.
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No. 05-___

IN THE
Supreme Court of the United States

GARRY IOFFE,
Petitioner,

v.

SKOKIE MOTOR SALES, INC.,
doing business as Sherman Dodge,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under the Motor Vehicle Information and Cost Savings Act, 49 U.S.C. § 32701, *et seq.*, a private party may recover damages from a person who violates the Act or its implementing regulations "with intent to defraud." 49 U.S.C. § 32710(a). The question presented is:

> To state a claim under the Motor Vehicle Information and Cost Savings Act, is it sufficient for a plaintiff to allege that the defendant violated the Act with intent to defraud (as the Eleventh Circuit has held), or must a plaintiff also allege intent to defraud with respect to a vehicle's mileage (as the Seventh Circuit held below)?

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Krogull v. Woodfield Chevrolet,
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Leslie v. George Thompson Ford, Inc.,
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Salmeron v. Highlands Ford Sales, Inc.,
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Odometer Disclosure Requirements,
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S. Rep. No. 92-413 (1971), *reprinted in* 1972 U.S.C.C.A.N. 3960 ..... 3, 13

S. Rep. 99-47 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5620 ..... 4, 13, 14, 21

Truth in Mileage Act, Pub. L. No. 99-579, 100 Stat. 3309 (1986) 4, 5, 13

MISCELLANEOUS

James Bernstein, *Odometer Fraud: A crime that's spinning out of control, Feds say mileage is rolled back on 450,000 cars a year*, Newsday, June 7, 2005, at D13 18

Marcia Biederman, *A Used Car or A Katrina Biohazard?*, N.Y. Times, Oct. 17, 2005, at D10 18

National Highway Traffic Safety Administration, *The Incidence Rate of Odometer Fraud* (2002), *available at* http://www.nhtsa.dot.gov/cars/rules/regrev/evaluate/pdf/809441.pdf 15, 16, 17

National Highway Traffic Safety Administration, Opinion Letter, *available at* http://www.nhtsa.dot.gov/cars/rules/interps/aiam/3360.html 14

Michelle Singletary, *Flood damaged cars wash up in used-car lots,* Miami Herald, Oct. 2, 2005, at E3 . . . 18

Daniel Walsh, *Bridgeton: Home Office of Auto Fraud, Officials Say,* Atlantic City Press, July 31, 2005, at A1 16

Barbara Whitaker, *Safety: Things to Think About If You're Thinking 'Used',* N.Y. Times, Oct. 26, 2005, at G38 . . 14-15, 18

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Seventh Circuit is reported at 414 F.3d 708, and is reproduced in the Appendix at 1a. The decision of the district court is unreported and is reproduced in the Appendix at 15a.

JURISDICTION

The judgment of the court of appeals was entered on July 7, 2005. On September 29, 2005, Justice Stevens granted an extension of the time within which to file this petition to and including December 4, 2005. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The Motor Vehicle Information and Cost Savings Act, 49 U.S.C. § 32710, provides:

> **(a) Violation and amount of damages.**–A person that violates this chapter or a regulation prescribed or order issued under this chapter, with intent to defraud, is liable for 3 times the actual damages or $1,500, whichever is greater.
>
> **(b) Civil actions.**–A person may bring a civil action to enforce a claim under this section in an appropriate United States district court or in another court of competent jurisdiction . . . .

STATEMENT

Title IV of the Motor Vehicle Information and Cost Savings Act (MVICSA), 49 U.S.C. § 32701, *et seq.*, commonly known as the Odometer Act, establishes a comprehensive regulatory scheme designed to provide consumer confidence in the used auto market by preventing odometer fraud and ensuring the ability of consumers to assess the safety and reliability of motor vehicles. The Act allows an injured consumer to bring a civil action for damages against a person who violates the Act or its implementing regulations "with intent to defraud." 49 U.S.C. § 32710(a).

When petitioner Gary Ioffe purchased a car from respondent Sherman Dodge, Sherman Dodge did not show him the vehicle's title, in violation of MVICSA's implementing regulations. Instead, a Sherman Dodge employee signed Mr. Ioffe's name to the title without his permission. As a result, at the time that he made his purchase, Mr. Ioffe did not know what the title would have revealed—that the vehicle was a rebuilt wreck that was missing an airbag. After he learned the vehicle's true history, Mr. Ioffe filed suit, alleging that Sherman Dodge had violated the Act with the intent to defraud him. In the decision below, the Seventh Circuit held that Mr. Ioffe had not stated a claim under the Act. In rejecting Mr. Ioffe's claim, the court created an additional element that is nowhere to be found in the text of the statute–a requirement that the plaintiff prove intent to defraud *with respect to the vehicle's mileage*. The Eleventh Circuit, in a decision issued just two months later, rejected that approach, concluding that "the Seventh Circuit failed to apply the

statute's plain language." *Owens v. Samkle Automotive Inc.*, 425 F.3d 1318, 1321 n.4 (11th Cir. 2005).

The open disagreement between the Seventh and Eleventh Circuits brings into focus a wider disarray among the lower federal courts and state appellate courts. The split of authority is particularly acute in states such as Illinois and Georgia, where the state and federal courts have arrived at opposite answers to the question presented. Given the need for uniformity in the interstate auto market, the disruption to the national regulatory scheme engendered by the decision below is intolerable and requires this Court's immediate intervention.

A. Statutory and Regulatory Framework

In 1972, Congress enacted the MVICSA to "reduce vehicle operating costs and improve the safety of passenger motor vehicles." S. Rep. No. 92-413 (1971), *reprinted in* 1972 U.S.C.C.A.N. 3960, 3961. Title IV of the MVICSA established "a national policy against odometer tampering." *Id.* In findings accompanying the legislation, Congress concluded that consumers rely heavily on the odometer reading "as an index of the condition and value of the vehicle" and that accurate disclosures are needed to assist buyers "in deciding on the safety and reliability of the vehicle." 49 U.S.C. § 32701(a).

The Act contains not only a flat prohibition on odometer tampering and related activities, *id.* § 32703, but also elaborate standardized disclosure requirements and record-keeping procedures designed